

TRUSTEESHIP AND PROPERTIES

ADDRESS TO ASSOCIATION OF BURSARS OF RELIGIOUS INSTITUTES MADE BY DAVID COX OF ARTHUR O'HAGAN, SOLICITORS, CHARLEMONT EXCHANGE, CHARLEMONT STREET, DUBLIN 2 AT ANNUAL CONFERENCE ON THE 7TH NOVEMBER 2007

This address pertains to how property is held by Religious Congregations. Whilst in any disposition of property i.e. a sale, lease or mortgage, the Congregation must abide by and comply with Canon Law and Civil Law, I am primarily dealing with the application of the Civil Law to property transactions. For the most part, the purchaser dealing with a Congregation in a sale is not concerned with Canon Law and compliance therewith. This is an internal matter. In a sale by a Congregation the rules pertaining to alienation of property in the Constitutions of the Congregation will require to be complied with. This usually will involve Resolutions by a Provincial Leader and Council and a General Superior and Council and further in the event that the sale price is above a certain sum the approval of the Holy See will be required. As I say, however whilst this has to be carried out, evidence of such would not be sought in a civil sale.

Normally property is held by a Religious Congregation in any of the following three ways:-

- 1) Joint Ownership (Joint tenancy as distinct from tenancy in common) where say four or more Religious are named on the title deeds in their Baptismal names without any reference to a Trust in the Title Deeds and without any reference to the said persons being described as Trustees i.e. a Trust is kept off the title.
- 2) Company limited by guarantee and not having a share capital.
- 3) Joint Ownership by say four or more Religious with an expressed Trust stated in the title deeds or description of the Religious as Trustees.

The advantages of no. 1 above (Joint Ownership in the Baptismal names of Religious) (which is my preference) are as follows:-

- a) Uncomplicated – no need to have to resort to the Commissioners of Charitable Donations and Bequests for Ireland (The Charity Commissioners) for Consent. On the face of it the Religious named will appear as absolute or beneficial owners. A safeguard which should be done is to have the said Religious sign a separate Declaration of Trust declaring that they hold the property in the within Deed upon Trust for the Congregation as directed by the Provincial Leader for the time being of the Congregation. This Declaration which of course should not be registered in the Registry of Deeds or Land Registry (the two property Registries in the

Country) so that the Declaration will be kept off the title, will be valid nonetheless as evidence of the contents of the Declaration. If such Declaration were registered then this would become known to a purchaser's lawyer when making a search against persons on the title and the Trust would come on the title and resort would have to be made to the Charity Commissioners for consent to sale.

- b) Autonomy – Freedom to dispose of the property and especially in the event of desire to make a gift or dispose of property at less than the market value. There is a difficulty about disposal at less than the market value where there is a Trust on the Title and which I shall elucidate further herein.
- c) Easy to transfer to other members of the Congregation when one wishes to update the title to take account of very elderly Religious who are on the Title Deeds already. A Deed can be done whereby the new Religious can be stated to be entitled in equity to the property and call upon the existing Religious to transfer the property to them. A Certificate under the Finance Acts will be inserted in the Deed to certify that the instrument (Deed) is a conveyance or transfer on any occasion not being a sale or mortgage. This will ensure that the Deed is not one of a Commercial nature and will be free from stamp duty. A Charity Tax Reference number will be required when submitting the Deed to the Revenue Commissioners for exemption from stamp duty.

The disadvantages of 1 above would be the following:

- a) A Religious may be abroad at the time it is desired to sell the property and his / her signature is required. With forward planning, a Power of Attorney can be settled before such person goes abroad or with modern communications it may not be too difficult to have the Deed sent to the particular spot in the world where the Religious is resident.
- b) One of the Religious named on the Deeds is *incompis mentis* and in such event may require to be made a Ward of Court in order for a person called his / her Committee to execute the Deed.
- c) All the Religious on the title deeds may be dead. This can be cured by making application for a Grant of Probate (Title Grant) to the last Deceased Religious. It is very wise to keep your Wills intact and that all Religious make Wills. Alternatively, this *lacunae* can be cured by putting a Trust on the title; viz, making application to the Charity Commissioners for an Order appointing the new Religious as Trustees and vesting the property in such new Trustees. This is done by way of a Statutory Declaration reciting the facts and dates of death. As I have said this will put a Trust on the Title and will mean that in any subsequent disposal the Consent of the Commissioners will be required.

- d) A minor disadvantage perhaps is that if it is desired to vest property in a new Provincial Leader and Council members, there will be more paperwork if this requires to be done on each occasion. The necessary Conveyancing work can be quite easily done however.

The main advantage of no. 2 above i.e. a Company limited by guarantee is that the Company is a separate legal entity in itself and never dies, so that one is not concerned with a death of any Religious.

The disadvantages of no. 2 would be as follows:-

- a) Annual Returns require to be made to the Companies Office. In these returns the names of the directors are set out and details of mortgages if any. This is not onerous in itself but it is surprising how easy it is to forget about such a matter. Nowadays the Registrar of Companies is very vigilant and many Companies are struck off the Register for lack of filing annual returns over some years. If a Company is struck off an application requires to be made to the High Court to reinstate it and in the meantime nothing can be done with the property because the legal entity, which owned it, has been struck off or cancelled so to speak and the property in the interim vests in the Minister for Finance. There are financial penalties for the late filing of Returns.
- b) The Companies Office being a Public Registry i.e. any member of the public can inspect the annual returns. There is no great deal about this but if the EC were to make regulations requiring information to be lodged in connection with the annual returns or more detailed accounts (presently a Company under the control of the Religious is exempt from having to lodge Accounts) this will give the public information on the financial affairs of the Religious Company. However, with the Charities Bill now passing through the Dail, Religious will (and many already have been involved) be involved in settling accounts and reports on their activities. Accounts will require to be settled for the proposed new Regulatory Authority under the Bill when it becomes Law probably some time in 2008.
- c) A Company normally does not have the power to make a gift even though there may be a power in the Memorandum of Association of the Company not only to sell but to dispose of or otherwise deal with a property and assets of the Company. It would seem that the words "otherwise deal with" should be conclusive and allow the making of a gift but not so. This is a grey area particularly arising from a Supreme Court decision in *Re: Greendale Developments* (no. 2, 1998) 1,I.R8. I did have an instance where a Diocesan Company wished to make a gift of some land to a Youth Club and the advice from a Senior Counsel was that application should be made to the Charity Commissioners under Section 34(2) of the Charities Act 1961 as amended by Section 11 of the Charities Act 1973. I will be referring to Section 11 of the Charities Act 1973 later.

- d) If the main object of the Company is charitable which is invariably the position even if the Company has the power of sale as is normal, this does not mean that the Company cannot avoid applying to the Charity Commissioners for consent to a disposition such as a sale of any property. The power of the Company to sell without having to apply to the Charity Commissioners is confined to lands acquired after the date of its incorporation and will not apply to land of the Religious which prior to such land becoming vested in the Company was held by the Religious. The reasoning for this is that the main object of the Company being charitable thereby brings a Charitable Trust onto the title which had not been theretofore disclosed and as a Trustee cannot give itself a power of sale (only a non Trustee or Beneficial Owner can do this) resort has to be made to the Charity Commissioners for consent. This is a complex area of Law and there is difference of legal opinion. It may be possible when Religious in their Baptismal names transfer property to the Company to give the Company a Trust to sell the property with power to postpone the sale and pending such sale to use the property for the charitable purposes of the Congregation.

The Charity Commissioners in any application can enquire into the circumstances and if after enquiry they are satisfied that the proposed disposition (sale etc.) mortgage or charge would be advantageous to the Charity may authorise that disposition, mortgage or charge or give such directions in relation thereto (including directions for securing the due investment or application of the money arising therefrom for the benefit of the Charity as they think fit). Nowadays it has to be said that in all sales of property at the open market value the Charity Commissioners give their consent readily. In making application for consent an Auctioneer's Certificate has to be furnished stating that the sale price represents the open market value.

The main disadvantages of having Trusts on the title and the requirement to seek the authorisation of the Charity Commissioners (there is a possible alternative upon which I shall comment later) are as follows:

- (a) As indicated above the Charity Commissioners are constrained by the Statute governing them in consenting to dispositions of property at less than the market value. I will quote from Section 11 (2) of the Charities Act 1973 viz:

"Where an application is made to the Board by the Trustees of any Charity comprising land representing that a specified disposition of the land for the benefit of a specified charitable purpose other than a purpose of the charity of which they are Trustees, being a disposition the consideration of which is not the market value, would if effected operate for the benefit of the public, the Board may, if they think fit enquire into the circumstances and if after enquiry, they are satisfied that the proposed disposition would both be for the benefit of the specified charitable purpose and operate for the benefit of the public, they may authorise that disposition and give such directions in relation thereto including directions for securing the due investment for

application of any money arising therefrom for the benefit of the charity as they think fit”.

You will note the reference to the word “other”. Not only must the disposition be for the benefit of a specified charitable purpose but that charitable purpose must be different from the charitable purpose of the Charity proposing to make the disposition. I cannot really understand this. It seems to clearly pre-empt say an educational charity giving a gift to another educational charity carrying on the same educational purposes. I had a most interesting case where an application under this section had to be made and we had to show that there was a difference between autism and other mental handicap on the one hand, and mental illness on the other hand and had to get specific instructions regarding the difference (not easy!) so as to show that the purposes differed.

As indicated earlier if the members of the Religious Congregation held property in their Baptismal names without reference to a Trust they could make such a disposition / Transfer, without any such constraints.

- (b) Although the said Section refers to the proposed disposition being for the benefit of a specified charitable purpose, the Charity Commissioners take the view that the nature or status of the proposed recipient of the gift must be a Charity i.e. notwithstanding that there is a charitable purpose intended; because it is to be carried out by a Statutory Authority the Commissioners cannot grant consent. This is in my view not correct because the enquiry which the Commissioners are enjoined to carry out by virtue of the Section is not an enquiry as to the nature or status of the recipient of the gift, but as to the nature and purpose for which the disposition is to be made. I am not aware of any general legal principle that a purpose which the law regards as a charitable purpose ceases to be such, if fulfilled by a Statutory Body which has statutory functions in the same area of activity. I only mention this because it can often happen that a Religious Congregation may wish to make available property to a Local Authority for a social reason and if there is a Trust on the Title of the Religious, there will be a difficulty.

I have had recent experience of an application before the Charity Commissioners in relation to a Transfer at less than the market value to a Local Authority for a social reason which was charitable. Because the Local Authority agreed to carry out development in order to make the property of use for the intended charitable purpose, the Charity Commissioner did consent to the property being vested in the Local Authority initially but on an undertaking that the Local Authority in due course when development had been completed, would transfer the property to a recognised Charity. You can image how complex and time consuming was the transaction.

Notwithstanding all I have said about the advantages of having property vested in the names of Religious in their baptismal names as joint tenants (Joint Tenancy means the survivor takes all rather than a Tenancy in Common which means that each Joint Owner gets a particular share which can be passed on separately under a Deed or a Will), there is an instance where the requirements of Canon

Law would probably need to be part of a Civil transaction. I am referring to an instance where a Religious Congregation is obtaining a loan. In such instance a Bank / Financial Institution will require more reassurance and accordingly the necessary compliance with the Constitutions such as the passing of resolutions by the respective superiors and his / her Councils and consent from the Holy See (if above the required limit) will require to be furnished.

I mentioned earlier that there is a possible alternative to having to apply to the Charity Commissioners for consent to a disposition. This alternative could be done by resorting to Canon Law. A Civil Law transaction can include Canon Law, which is a separate jurisdiction, provided that all the requirements of Canon Law are complied with. A sale or other disposition could be carried out by virtue of compliance with the Constitutions, the passing of various resolutions and any other Canon Law evidence to be rounded off by a Statutory Declaration made by a Canon Lawyer referring to all the requirements of Canon Law including reference to the various codes under Canon Law and that all requirements have been complied with. This alternative method of carrying out a transaction would however be unusual. In most transactions particularly if a sale is for full market value it is easier to apply to the Charity Commissioners for their Consent.

There are two property Registries in Ireland. The older one is the Registry of Deeds and is regarded as a Private Registry whereas the Land Registry is a Public Registry. Anyone can go into the Land Registry and inspect a map or other document, for a small fee of course. The title in the Land Registry is contained in what is called a Land Registry Folio with a number and the county and a map. The large bundles of documents, which one often associates with transactions, are because documents are registered in the Registry of Deeds and have accumulated over so many years. The way of registering a Deed in the Registry of Deeds is to complete a form called a Memorial; this is a resume of the Deed. The great advantage of a Memorial is that if the title deeds are lost, a copy of the Memorial can be obtained from the Registry of Deeds. I had a case recently where no title deeds could be found to a property. Somebody came across a draft of a Deed. Following enquiry of this draft Deed which was in 1724 I was able to obtain a Memorial from the Registry of Deeds as evidence to show that such a Deed did exist i.e. the draft had been completed. The Memorial is as I have said only a resume and may not contain information such as covenants, which would affect the title. What is normally contained in the Memorial are the parties to the Deed and a full description of the property. The other main disadvantage is that if there was a map attached to the Deed there would be no map attached to the Memorial.

Finally I would mention that the Charity Commissioners have functions, which are entirely distinct from the Revenue Commissioners. The Charity Commissioners are guardians of Trust property and deal with applications, the nature of which I had described above. Until the new Charities Bill becomes law there is no Register of Charities as such. The Revenue Commissioners grant a Charity Tax Reference exemption. You will recognise a number prefixed by the letters "CHY". This Charity Tax Reference exempts charities from having to pay Stamp Duty, Capital Gains Tax, Capital Acquisitions Tax and Income Tax. The Revenue Commissioners are entitled to look for accounts and to know about the activities of the Charity. Some of you will have found that where you have had sales for a

large sum of money the Revenue Commissioners, Charities Branch have enquired as to the application of the monies and your List of Activities. This is because the Revenue Commissioners want monies to be expended for charitable purposes and not accumulated although this in my view does not prevent money being put aside for accommodation and care of members of a Religious Congregation. In this respect it is interesting to note that in the Definitions Section of the Charities Bill 2007 presently passing through the Dail the words "Charitable Organisation" mean the Trustees of a Charitable Trust or a Body Corporate or an unincorporated Body of Persons (i) that promotes a charitable purpose only (ii) that applies all of its property (both real and personal) in furtherance of that purpose except for monies expended; (i) In the operation and maintenance of the body including monies paid in remuneration and superannuation of members of the staff of the body, and (ii) In the case of a Religious Organisation or Community, on accommodation and care of members of the Organisation or Community and (iii) None of the property of which – (i) is paid or payable to the members of the body or (ii) would be payable to members of the body upon its dissolution or its ceasing to promote those purposes.

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